A

Lim Tuck Sun v Celcom (M) Bhd & Ors and another appeal

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)-154–01 OF 2023 AND W-02(IM)-155–01 OF 2023
MARIANA YAHYA, HASHIM HAMZAH AND FAIZAH JAMALUDIN JJCA
21 APRIL 2025

C

Civil Procedure — Judgment — Expunction of judgment — Audio-video clip ('video clip') of heated exchange between trial judge and counsel during Zoom trial proceedings went viral on WhatsApp after trial had concluded — Trial judge wrote 'judgment' pertaining solely to video clip — Counsel who represented some of
D *parties at trial and offended by allegations of unprofessional conduct made against him in 'judgment' applied to intervene in suit to expunge 'judgment' — Counsel also applied to recuse trial judge from hearing intervention and expunction application — Trial judge heard and dismissed all the applications — Whether*
E *'judgment' should never have been written as it served no purpose other than to justify trial judge's verbal outbursts in video clip — Whether writing of 'judgment' without affording maligned counsel opportunity to defend himself was abuse of process — Whether justice of case demanded that counsel's applications to intervene, expunge and recuse should have been allowed*

F

Civil Procedure — Judgment — Whether 'judgment' not really a judgment — Trial judge wrote 'judgment' concerning brief video-audio clip of trial proceedings which went viral on WhatsApp — 'Judgment' sought to explain what happened in clip for sake of public interest and interests of due administration of
G *justice — Whether 'judgment' lacked characteristics of a proper judgment and should never have been written — Whether 'judgment' did not emanate from any cause or matter properly before court but damaged counsel's reputation without giving him opportunity to defend himself against allegations of unprofessional conduct made against him — Whether 'judgment' was eminently fit for*
H *expungement*

The appellant was co-counsel for some of the defendants in two High Court suits which were heard together and concluded by the recording of a consent judgment. During the trial, whilst a witness was being examined via the Zoom
I platform, a heated exchange of words broke out between the trial judge, the appellant and the counsel for the plaintiffs ('the heated exchange'). Two months after the conclusion of the trial, a 40 second audio-video clip ('the video clip') of the heated exchange went viral on WhatsApp. It showed the trial judge appearing angry, agitated and shouting at counsel and threatening to

lodge a disciplinary complaint. This caused plaintiffs' counsel to request the court for a case management ('CM') date to clarify that none of the parties or counsel was involved in the circulation of the video clip. At the CM, the trial judge apologised to both the appellants' and the plaintiffs' counsel for losing his temper at the time depicted in the video clip. The judge further clarified that he did not file any disciplinary complaint against counsel and regretted making such a threat. The judge also said he considered the matter closed. About three weeks after the CM, the parties were informed that a written judgment of the court ('the impugned judgment') was available for collection. The impugned judgment, which was published in local law journals, concerned the video clip. Aggrieved that the allegations made against him in the impugned judgment had damaged his reputation, the appellant applied to intervene in the proceedings to obtain an order to expunge the impugned judgment ('the intervention and expunction application'). The appellant also applied to recuse the trial judge from hearing the intervention and expunction application and to have another High Court judge determine the same. The trial judge heard and dismissed all the applications holding that: (a) the recusal application was refused as the appellant had not shown that he would suffer 'a real danger of bias' if the trial judge heard the intervention and expunction application; (b) intervention had to be refused as the appellant had not satisfied the first and second limbs of O 15 r 6(2)(b) of the Rules of Court 2012; and (c) expunction of the impugned judgment could not be allowed as it was written in legitimate exercise of judicial independence in the interests of the public and the due administration of justice and for the benefit of practising lawyers. The trial judge held that his decisions dismissing the appellant's applications were not appealable as they did not constitute a 'decision' under s 3, read together with s 67(1), of the Courts of Judicature Act 1964 as they were not made in the course of trial and did not have the effect of finally disposing of the rights of the parties in the two suits. The instant appeals were against the High Court's dismissal of the appellant's applications.

Held, unanimously allowing the appeals, setting aside the High Court's decisions, allowing the appellant's applications and ordering the impugned judgment to be expunged in its entirety:

(1) The impugned judgment did not arise from the hearing of any cause or matter properly before the trial judge, nor did it contain any specific decision capable of enforcement within the legal framework of the Rules of Court 2012. Merely designating a document as a 'judgment' did not, in itself, confer upon it the legal status of a judgment. The impugned judgment lacked reasoning or radio decidendi and consisted primarily of obiter dicta of factual findings and the trial judge's determination concerning the video clip. A sound judgment had to have ratio decidendi or reason for the decision. This was an essential part of a judgment. It must incorporate the court's reasoning and provide a detailed exposition

of the judicial thought-process in reaching the decision. As the impugned judgment did not embody these essential characteristics, it was not a legally binding judgment nor a 'decision' within the meaning of s 3 of the Courts of Judicature Act 1964 ('the CJA') (see paras 68–70).

(2) The trial judge's orders in respect of the appellant's applications were not made in the course of a trial or matter and did they dispose of the rights of the parties in the two suits. Hence, they were not 'rulings' as defined in s 3 of the CJA and were therefore appealable to this court. Furthermore, the subject-matter of the applications did not fall within the category of non-appealable matters set out in s 68 of the CJA (see paras 80 & 85).

(3) The trial judge should not have applied O 15 r 6(2)(b) of the Rules of Court 2012 to disallow the appellant's intervention application as that provision was not applicable in the circumstances of this case and was entirely unsuitable and left the appellant without a procedural avenue to seek redress in respect of the critical statements made against him in the impugned judgment. The trial judge ought to have invoked the Court's inherent jurisdiction to allow the intervention application in the face of no objection from any party to the said application (see paras 93–94 & 100–101).

(4) The appellant had satisfied the test laid down in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501 to expunge the impugned judgment. There was a clear abuse of process when the trial judge authored the impugned judgment ultra vires his judicial authority as the matter was neither a cause nor an issue properly arising within the main suits before him. In addition, there was breach of natural justice as the appellant was never given an opportunity, before the impugned judgment was prepared, to explain or defend himself. The entire impugned judgment was unnecessary and served no purpose other than to justify the trial judge's outburst during the Zoom proceedings (see paras 109 & 111–113).

(5) Particularly during the course of the Zoom proceedings, the trial judge had expressed views in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective mind. The justification for the trial judge's recusal arose from the extrajudicial nature of the impugned judgment, which ought not to have been written, particularly as it pertained to the appellant, who, at the material time, was counsel for the former defendants — a position that carried the responsibility of being an officer of the court. The impugned judgment could not be said to have been written with objectivity, rationality or temperance in language. The expressions used therein were neither mandated by law nor aligned with the established norms of judicial propriety. In light of the facts and circumstances in this case, it was

evident that there existed a real danger of bias if the trial judge presided over the intervention and expunction application. The dismissal of the recusal application further substantiated this concern, warranting appellate intervention by this court (see paras 124–127).

[Bahasa Malaysia summary

Perayu adalah peguam bersama untuk beberapa defendan dalam dua saman Mahkamah Tinggi yang didengar bersama dan diselesaikan dengan rakaman penghakiman persetujuan. Semasa perbicaraan, ketika seorang saksi sedang diperiksa melalui platform Zoom, berlaku pertikaman lidah yang tegang antara hakim perbicaraan, perayu dan peguam bagi pihak plaintif ('pertikaman lidah tersebut'). Dua bulan selepas tamat perbicaraan, klip audio-video selama 40 saat ('klip video tersebut') pertikaman lidah menjadi tular di WhatsApp. Ia menunjukkan hakim perbicaraan kelihatan marah, gelisah dan menjerit kepada peguam dan mengancam untuk membuat aduan tatatertib. Ini menyebabkan peguam plaintif meminta mahkamah untuk tarikh pengurusan kes ('CM') untuk menjelaskan bahawa tiada pihak atau peguam yang terlibat dalam edaran klip video itu. Semasa CM, hakim perbicaraan memohon maaf kepada kedua-dua perayu dan peguam plaintif kerana hilang sabar pada masa yang digambarkan dalam klip video itu. Hakim selanjutnya menjelaskan bahawa beliau tidak memfailkan sebarang aduan tatatertib terhadap peguam dan kesal membuat ugutan sedemikian. Hakim juga berkata beliau menganggap perkara itu sudah ditutup. Kira-kira tiga minggu selepas CM, pihak-pihak dimaklumkan bahawa penghakiman bertulis mahkamah ('penghakiman yang disangkal') tersedia untuk diambil. Penghakiman yang dipertikaikan, yang diterbitkan dalam jurnal undang-undang tempatan, membabitkan klip video itu. Terkilan kerana dakwaan yang dibuat terhadapnya dalam penghakiman yang disangkal telah merosakkan reputasinya, perayu memohon untuk mencelah dalam prosiding untuk mendapatkan perintah untuk membatalkan penghakiman yang disangkal ('permohonan mencelah dan pembatalan'). Perayu juga memohon untuk melucutkan hakim perbicaraan daripada mendengar permohonan mencelah dan pembatalan dan meminta hakim Mahkamah Tinggi lain menentukan perkara yang sama. Hakim perbicaraan mendengar dan menolak semua permohonan dengan memutuskan bahawa: (a) permohonan pelucutan ditolak kerana perayu tidak menunjukkan bahawa dia akan mengalami 'bahaya berat sebelah' jika hakim perbicaraan mendengar permohonan mencelah dan pembatalan; (b) pencelahan harus ditolak kerana perayu tidak memenuhi bahagian pertama dan kedua A 15 k 6(2) Kaedah-Kaedah Mahkamah; dan (c) pembatalan penghakiman yang disangkal tidak boleh dibenarkan memandangkan ia telah ditulis dalam pelaksanaan yang sah terhadap kebebasan kehakiman demi kepentingan awam serta pentadbiran keadilan yang sewajarnya dan untuk manfaat para peguam yang sedang beramal. Hakim perbicaraan memutuskan bahawa keputusannya yang menolak permohonan-permohonan perayu tidak boleh dirayu kerana ia tidak

merupakan suatu 'keputusan' di bawah s 3 yang dibaca bersama s 67(1) Akta Mahkamah Kehakiman 1964 memandangkan ia tidak dibuat dalam perjalanan perbicaraan dan tidak mempunyai kesan muktamad dalam melupuskan hak-hak pihak-pihak dalam kedua-dua saman tersebut. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi yang menolak permohonan-permohonan perayu.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, membenarkan permohonan perayu dan memerintahkan penghakiman yang disangkal dibatalkan secara keseluruhan:

(1) Penghakiman yang dipertikaikan tidak timbul daripada pendengaran apa-apa kausa atau perkara dengan betul di hadapan hakim bicara, mahupun ia mengandungi sebarang keputusan khusus yang boleh dikuatkuasakan dalam rangka kerja undang-undang Kaedah-Kaedah Mahkamah 2012. Semata-mata menetapkan dokumen sebagai 'penghakiman' tidak, dengan sendirinya, memberikan kepadanya status undang-undang penghakiman. Penghakiman yang dipertikaikan tidak mempunyai alasan atau radio decidendi dan terdiri terutamanya daripada obiter dicta dapatan fakta dan penentuan hakim perbicaraan berkenaan klip video itu. Pertimbangan yang wajar mesti mempunyai nisbah keputusan atau alasan untuk keputusan itu. Ini adalah bahagian penting dalam penghakiman. Ia mesti menggabungkan alasan mahkamah dan memberikan penjelasan terperinci tentang proses pemikiran kehakiman dalam mencapai keputusan. Oleh kerana penghakiman yang dipertikaikan tidak merangkumi ciri-ciri penting ini, ia bukanlah penghakiman yang mengikat di sisi undang-undang mahupun 'keputusan' dalam pengertian s 3 Akta Mahkamah Kehakiman 1964 ('AMK') (lihat perenggan 68–70).

(2) Perintah hakim perbicaraan berkenaan dengan permohonan perayu tidak dibuat semasa perbicaraan atau perkara dan tidak melupuskan hak pihak-pihak dalam kedua-dua guaman itu. Oleh itu, ia bukan 'ketetapan' seperti yang ditakrifkan dalam s 3 AMK dan oleh itu boleh dirayu kepada mahkamah ini. Tambahan pula, perkara utama permohonan tidak termasuk dalam kategori perkara tidak boleh dirayu yang dinyatakan dalam s 68 AMK (lihat perenggan 80 & 85).

(3) Hakim perbicaraan tidak sepatutnya mengguna pakai A 15 k 6(2)(b) Kaedah-Kaedah Mahkamah 2012 untuk tidak membenarkan permohonan mencelah perayu memandangkan peruntukan tersebut tidak terpakai dalam keadaan kes ini dan sama sekali tidak sesuai, ia telah menyebabkan perayu tidak mempunyai saluran prosedur untuk mendapatkan ganti rugi berhubung kenyataan-kenyataan kritikal yang dibuat terhadapnya dalam penghakiman yang dipertikai. Hakim perbicaraan sepatutnya menggunakan bidang kuasa sedia ada

Mahkamah untuk membenarkan permohonan pencelah, memandangkan tiada bantahan dikemukakan oleh mana-mana pihak terhadap permohonan tersebut (lihat perenggan 93–94 & 100–101).

(4) Perayu telah memenuhi ujian yang ditetapkan dalam *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501 untuk membatalkan penghakiman yang disangkal. Terdapat penyalahgunaan proses yang jelas apabila hakim perbicaraan telah mengarang penghakiman yang dipertikai tersebut secara ultra vires kuasa kehakimannya memandangkan perkara itu bukanlah suatu kausa atau isu yang timbul secara sah dalam tindakan utama yang berada di hadapannya. Selain itu, terdapat pelanggaran prinsip keadilan asasi kerana perayu tidak pernah diberikan peluang untuk menjelaskan atau mempertahankan dirinya sebelum penghakiman tersebut disediakan. Keseluruhan penghakiman yang dipertikai itu adalah tidak perlu dan tidak berfungsi melainkan untuk mewajarkan ledakan emosi hakim perbicaraan semasa prosiding melalui Zoom (lihat perenggan 109 & 111–113).

(5) Khususnya sepanjang prosiding melalui platform Zoom, hakim perbicaraan telah menyuarakan pandangan dengan istilah yang begitu melampau dan tidak seimbang sehingga menimbulkan keraguan terhadap keupayaannya untuk mengadili isu tersebut dengan fikiran yang objektif. Justifikasi bagi pelucutan hakim perbicaraan timbul daripada sifat penghakiman yang dipertikaikan itu yang bersifat luar bidang kehakiman, yang sepatutnya tidak ditulis, terutamanya kerana ia melibatkan perayu yang pada masa material merupakan peguam kepada bekas-bekas defendan — satu kedudukan yang membawa tanggungjawab sebagai pegawai mahkamah. Penghakiman yang dipertikaikan itu tidak boleh dikatakan telah ditulis dengan objektiviti, rasionaliti atau kesederhanaan dari segi bahasa. Ungkapan-ungkapan yang digunakan di dalamnya tidak diperuntukkan oleh undang-undang mahupun selari dengan norma kewajaran kehakiman yang telah ditetapkan. Berdasarkan fakta dan keadaan dalam kes ini, ia adalah jelas bahawa wujud bahaya sebenar berat sebelah sekiranya hakim perbicaraan terus mendengar permohonan mencelah dan permohonan pembatalan. Penolakan terhadap permohonan pelucutan tersebut selanjutnya mengukuhkan kebimbangan ini, sekaligus mewajarkan campur tangan rayuan mahkamah ini (lihat perenggan 124–127).]

Cases referred to

Ang Sue Khoon v Majlis Bandaraya Pulau Pinang & Anor [2016] MLJU 1342, HC (refd)

Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia &

A *Anor* [2020] 2 MLJ 1, FC (refd)
Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad [2011] 1 MLJ 145, FC (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 2) [2022] 5 MLJ 135, FC (refd)
B *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, FC (refd)
Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor [2015] 1 MLJ 847, CA (distd)
Dharshini a/p Ganeson v Doraisingam a/l Thambyrajah [2020] MLJU 737, CA (refd)
C *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614, FC (refd)
Locabail (UK) Ltd v Bayfield Properties Ltd and another; Locabail (UK) Ltd and another v Waldorf Investment Corp and others; Timmins v Gormley; Williams v HM Inspector of Taxes and others; R v Bristol Betting and Gaming Licensing
D *Committee, ex parte O'Callaghan* [2000] 1 All ER 65, CA (folld)
Majlis Agama Islam Selangor v Bong Boon Chuen & Ors [2009] 6 MLJ 307, FC (distd)
Majlis Perbandaran Pulau Pinang v Sykt Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
E *Metramac Corp Sdn Bhd (formerly known as Sykt Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501, FC (folld)
Mohamad bin Hitam; ex p Am Finance Bhd (previously known as MBf Finance Bhd), Re [2006] 2 MLJ 744, HC (refd)
F *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445, HC (refd)
PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener) [2019] 4 MLJ 747, FC (refd)
Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors
G [1988] 1 MLJ 178, SC (refd)
PP v Tengku Adnan bin Tengku Mansor [2020] 5 MLJ 220, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Regina v Gough [1993] AC 646; [1993] 2 WLR 883, CA (refd)
H *Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd* [2014] 10 MLJ 413, HC (refd)
State of Uttar Pradesh v Mohammad Nairn AIR 1964 SC 703, SC (refd)
Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd [2003] 2 MLJ 495, CA (refd)
I *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697, CA (refd)
The State of Bihar v Ram Naresh Pandey and another AIR 1957 SC 389, SC (refd)
Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative,

executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals [2017] 3 MLJ 350, CA (refd)

Legislation referred to

Communications and Multimedia Act 1998
Courts of Judicature Act 1964 ss 3, 25(2), 67, 67(1), 68, Schedule, para 12
Legal Profession Act 1976
National Language Acts 1963/67 s 8
Rules of Court 2012 O 15 r 6, O 15 r 6(2), (2)(b), (2)(b)(i), (2)(b)(ii), O 18 r 19, O 32, O 32 r 1, O 42, O 42 r 1, 1(1), 1(2), O 53 r 8, O 53 r 8(1), O 92 r 4, Form 57
Rules of High Court 1980 (repealed by the Rules of Court 2012) O 15 r 6(2)(b), O 53, O 53 r 8(1)
Rules of the Court of Appeal 1994 r 18(4)(d), (4)(e)

Appeal from: *Celcom (Malaysia) Bhd & Anor v Tan Sri Dato' Tajudin bin Ramli & Ors and another case* [2022] MLJU 178 (High Court, Kuala Lumpur)

David Thomas Mathew (with Kenneth Koh Zhong Wey, Poon Wei Ying and Koh Jo Vin) (Xavier & Koh Partnership) for the appellant.
Saresh Mahendaren (Shearn Delamore & Co) for the first and second respondents.
Tobias Lim Koon Li (Lim Kian Leong & Co) for the third and fourth respondents.
Wong Han Wey (with Dyana Parmar) (Lee Hishammuddin Allen & Gledhill) for the 12th respondent.
Ranjit Singh (with Nicholas Yap) (Ranjit Singh & Yeoh) amicus curiae for the Malaysian Bar.

Mariana Yahya JCA:

INTRODUCTION

[1] These are two appeals heard together before this court, namely Civil Appeal No W-02(IM)-154–01 of 2023 ('Appeal 154') and Civil Appeal No W-02(IM)-155–01 of 2023 ('Appeal 155').

[2] Appeal 154 is an application to recuse the learned High Court judge ('learned HCJ') from hearing and disposing of the application to intervene and expunge, and is referred to as the 'recusal application'.

[3] Appeal 155 is an application for leave to intervene ('intervention application') and thereafter, to expunge ('expunction application') parts of the learned HCJ's judgment (doctored video clip) dated 18 February 2022 ('impugned judgment'). These applications are collectively referred to as the 'application to intervene and expunge'.

[4] The two applications are collectively referred to as the 'applications (two NAs)'. The applications (two NAs) were heard and disposed of by the learned HCJ on 30 December 2022 with the grounds of judgment delivered on 20 June 2023 ('the applications (two NAs) judgment').

[5] It is pertinent to note that the learned HCJ, despite dismissing the intervention application, decided to hear the merits of the application to intervene and expunge, and also the recusal, and dismissed the same. Both applications were disposed of on their respective merits.

[6] In these appeals, the respondents made no submissions and informed this court that they were not involved in the impugned judgment written by the learned HCJ. Meanwhile, by application, the Malaysian Bar, through its representative, stands in as amicus curiae to this court.

[7] The appeals before us centred on a unique fact arising from a judgment written by the learned HCJ (referred to as the impugned judgment, which did not pertain to the main suits, ie, Kuala Lumpur High Court Civil Suit No D5–22–610–2006 ('Suit 610') and Kuala Lumpur High Court Civil Suit No D1–22–1960–2008 ('Suit 1960'). The aggrieved party in this case is none other than a counsel (the appellant) who had represented a case in both suits that had been disposed of much earlier. Before we elaborate further, it is beneficial to review the facts that led to the filing of the appeals before us.

BACKGROUND FACTS

[8] The appellant, Mr Lim Tuck Sun ('LTS'), was the co-counsel for the fourth to ninth defendants in Suit 610 and the fourth to sixth defendants in Suit 1960 at the Kuala Lumpur High Court. These defendants comprise of German individuals and a German company (collectively referred to as the 'German entities'). Their lead counsel was Mr Christopher Leong Sau Foo, who was assisted by the appellant. The learned HCJ presided over both these suits, which were heard concurrently.

[9] On 27 September 2021, the matter was fixed for the examination of Thomas Ach ('Thomas'), one of the witnesses for the appellant's clients, via the Zoom platform ('continued trial'). During the continued trial, there were several objections taken by counsels to questions posed to Thomas, which resulted in heated exchanges between the counsels, namely Mr Lim Kian Leong (counsel for the first and second defendants), Mr Lim Tuck Sun and the learned HCJ. This was reflected in the full transcripts of the continued trial and subsequently was highlighted by the learned HCJ at p 395 of the impugned judgment.

[10] In November 2021, there was a confidential out-of-court settlement of the claims in Suit 610 and Suit 1960 involving the German entities, where both suits were withdrawn against them without the liberty to file afresh and no order as to costs by virtue of a consent order dated 19 November 2021. The German entities ceased to be parties and consequently, the appellant's firm's retainer came to an end.

[11] On or around 19 January 2022, a short audio-video clip of approximately 40 seconds in length ('the video clip') was widely circulated on a mobile messaging application, WhatsApp. It contained a brief snippet of the heated exchanges between the learned HCJ, the appellant and Mr Lim Kian Leong during the continued trial. The viral video clip captured the learned HCJ appearing visibly angered, agitated and shouting at counsel and stating that he would consider making a disciplinary complaint ('outburst'). The video clip seems to have been recorded using a separate mobile device from a screen playing the full recording of the Zoom court proceeding ('full recording').

[12] Due to the circulation of the video clip, the plaintiff's counsel via email dated 21 January 2022, requested a date for case management to clarify that no party or counsel was involved in the circulation of the said video clip, whether in its entirety or any redacted form.

[13] The case management convened on 25 January 2022 ('CM') was to ascertain the circumstances surrounding the dissemination of the video clip of the court proceedings and to determine the appropriate steps to move forward from the incident. As the German entities were no longer parties, the appellant attended the CM in his personal capacity as a courtesy to the court. The circulation of the video clip was deemed to be in breach of para 11, protocol to the procedural consent order dated 10 July 2021 and para 12 of annexure A in the consent order Zoom hearing.

The video clip

[14] While a factual determination is unnecessary, it is nevertheless prudent to pursue this line of inquiry to enhance clarity and ensure a comprehensive understanding of the issue before the court. The content of the 40 second video clip was first discussed during the CM, where the learned HCJ stated as follows (see full transcripts dated 25 January 2022):

> ... Irrespective of whatever circumstances on that day, on 27.9.2021 where Mr Thomas Ach gave evidence, no excuse on my part, despite the fact that Mr Thomas Ach's younger sister passed away, he wanted to finish his evidence, he wanted to rush to the train station because there was partial lockdown in Munich, to rush for the funeral, I think and there was a two-hour train ride. *Alright, and of course, Mr Lim Kian Leong and Mr Lim Tuck Sun, I owe you an apology. Mr Lim Kian*

Leong asked about the interpretation of the contracts, this is what my memory serves, if I am wrong please correct me. And then Mr Rabin objected a few times, I upheld the objections. And I also did indicate that I may want to lodge a complaint under section 99(2) of the Legal Profession Act 1976. Alright, so and then if my memory serves me correct I think I owe an apology to Mr Lim Tuck Sun and Mr Lim Kian Leong and I extend the apology again especially in view of the video clip and please listen again, Mr Lim Kian Leong and Mr Lim Tuck Sun, there is no excuse for losing my temperament alright, which I apologise on that day and I apologise again ... (Emphasis added.)

[15] Upon reviewing the full recording transcript of the continued trial, it can be established that the 40 second video clip corresponds to the transcript found at pp 26–27 of the full transcripts provided in encl 10 of Appeal 155 record, Bundle 2B, Section C.

[16] For ease of reference and comprehension of context, the transcripts from pp 26–27 are reproduced below:

YA: Just hold on. Stop sharing screen, so that I can see learned counsel's face. Mr Lim Tuck Sun, are you, yes, carry on. I have made a ruling that if you ask the witness what is his or her understanding of a contract, if I may use the quote, misjudge, that will be tantamount to allowing contracting parties to rewrite the contract subsequently after the breach, after Court litigation, Alright, Mr Lim Tuck Sun, you want me to revisit that matter?

LTS: No, My Lord, I didn't ask the question, except that I wilt make this reservation for re-examination because I will anticipate saving of time, in the course of cross-examination, if my learned friends for Celcom and Telekom Malaysia, then confine the questions accordingly and then leave the agreements alone. If they do not want to leave the agreements alone and dive into this, then —

YA: I don't understand. Alright, Mr Lim Tuck Sun, right now, I make a ruling regarding Mr Lim Kian Leong's question. I do not allow. Alright, Mr Lim Tuck Sun, why don't we just wait for Mr Lambert's questions and also Mr Rabin, then you can object and I will decide, Right now, I think we try not to, for want of better word, speculate or pre-empt. Alright. So, unless you want me to revisit my decision to disallow Mr Lim Kian Leong's last question, please move on. *Where is Mr Lim Tuck Sun? He has disappeared*. Mr Nirvan, what happened to your internet access. Really, and you are representing DTAH. Top telecommunication company in the world. Mr Nirvan, can you switch on the camera, I am talking to you.

LTS: *My Lord, I am sorry, I was removed.*

YA: I know. I don't know what happened. Ok. Mr Lim Tuck Sun,I have made my ruling, unless you want me to revisit —

LTS: I don't want me to. I just want that recorded that in the course of cross-examination, what goes around comes around.

RSN: My Lord, can I just say this? I honestly have no idea why this is being brought up now. I had not intended to ask anybody —

YA: I am going to exercise my powers because of Mr Thomas Ach's unique

circumstances. Unless there is relevancy, move on, Mr Lim Kian Leong. *Mr Lim Tuck Sun, have I made myself clear?*

LTS: *You have.*

YA: Mr Lim Kian Leong asked another question, not regarding interpretation of agreements, which is a pure question of law. Move on.

LKL: Very well, My Lord.

YA: *Because of special circumstances of Mr Thomas Ach. Cik Sari, ini semua dirakamkan? Kamu rakam masa ini. Saya mungkin akan ambil tindakan tatatertib*. Mr Lim Kian Leong, kindly proceed.

LKL: Yes, I am just reviewing my questions in the light of My Lord's ruling to see how I can shorten my proposed questions. And then, I will move on to this. I will just go to a completely different issue. If I can refer to the allegations against DeTe and my client, I would like to refer Mr Thomas Ach to the amended statement of claim for example in Suit 1960, para 6 to 6.4 which is in the bundle of pleadings, para 6 to 6.4. Sorry, could we move to para 66.4. I could show the English version. Sorry, it is the amended statement of claim. I think it is earlier than this. Sorry my bundle, pdf 6 to 6.4. Yes.

YA: Mr Lim Kian Leong, can you explain the details of document to Mr Ach then you proceed to ask.

LKL: Thank you, My Lord. Mr Ach, this is an allegation, this is taken from the amended statement of claim of the Plaintiff at Celcom, against DeTe and several directors and my clients and basically, I am going to read it and I will paraphrase what I understand it to mean. What they have alleged is, 'the renunciation of the rights shares in favour of the First Defendant, was the quid pro quo and the consideration for the grant of the veto rights, and the buyout provision so as to enable DTAH to exit from Celcom in the most favourable manner. Ok, if you can just, please ... (Emphasis added.)

[17] The learned HCJ at para 32 of the impugned judgment highlighted that the video clip was doctored. The learned HCJ further stated that it was Mr Lim Kian Leong that was asked a question and not the appellant, in which the appellant replied 'you have' and additionally the appellant's frame was deliberately omitted from the video clip. As evidenced by the transcript reproduced at para 16 above, the appellant had been removed shortly beforehand and was in the process of re-establishing his Zoom connection when the question, 'Mr Lim Tuck Sun, have I made myself clear?' was posed to him. The appellant thereafter responded in the affirmative, stating, 'You have'. In view of these circumstances, it may not be entirely accurate to assert that the appellant was 'deliberately omitted' from the video clip.

[18] Furthermore, the learned HCJ had also stated in the CM dated 25 January 2022 as follows:

YA: And also that is about it, I think. *Put it this way, at least the video clip was not doctored or dubbed or whatever, it is only a 40 second video of what actually happened*.

A So, I always believe that is the authority and administration of law of the courts as an institution, not a particular individual, and this is my humble view.

So please, yes. I consider this matter closed, alright. And I must add also, after the trial and two days after that, no report was lodged to disciplinary board and I regret saying those words because, how do I put this ... 4 to 9.30pm, and on that day, B coincidentally I did not take my lunch and also most importantly, Mr Thomas Ach was rushing for his funeral ... for the sister's funeral. (Emphasis added.)

C **[19]** Hence, it can be inferred from the learned HCJ's aforementioned statement that the 40 second video clip was not doctored in any way and that the issues arising from the video clip between the learned HCJ, counsel, and the parties of the proceeding have been resolved.

D **[20]** Notwithstanding the case management conducted earlier, the parties subsequently received a letter from the High Court on 18 February 2022, informing them that the impugned judgment was available for collection. The impugned judgment was also published in the Malaysian Law Reports, ie, [2022] MLJU 178, [2022] 3 MLRH 217, [2022] 4 CLJ 381, and [2022] 3 AMR 486, which the learned HCJ confirmed at para 6 of the applications ('two E NAs') judgment.

F **[21]** It was a shock to the appellant to discover that the learned HCJ had written the impugned judgment concerning the video clip and the impugned judgment did not arise from any decision or order of the learned HCJ. Neither did it arise from any dispute between the litigating parties in Suits 610 and Suit 1960. It also did not affect the rights and interests of any of the litigating parties. In short, there was no order or judgment pronounced by the learned HCJ in the presence of the parties involved, and the issuance of the impugned judgment was beyond the appellant's and the parties' expectations. G

[22] The appellant contends that the impugned judgment contained highly critical remarks about his conduct as an advocate and solicitor during the continued trial and included suggestions that the appellant was guilty of H misconduct. Aggrieved by the impugned judgment, the appellant then filed the applications ('two NAs') to intervene and to expunge the said impugned judgment and recuse the learned HCJ.

The applications ('two NAs')

I

[23] On 8 April 2022, the appellant filed an application before the High Court seeking leave to intervene and an order to expunge the impugned judgment (defined in para [3] above as 'application to intervene and expunge'). The application was filed under O 15 r 6 of the Rules of Court 2012 ('the ROC

2012') and/or under the inherent jurisdiction of the court. The reliefs sought by the appellant are as follows:

(a) that leave be granted to the appellant to intervene in the suit,

(b) if prayer 1 above is allowed, an order that:

(i) the appellant, by counsel, be permitted to participate during this matter; and

(ii) that the remarks made by the court against the appellant as set out in appendix 1, be expunged from the impugned judgment;

(c) no order as to costs; and

(d) such further and/or other reliefs as the court deems fit and proper to grant.

[24] The first case management in respect of the said application to intervene and expunge was conducted on 18 April 2022 ('first CM'), during which the learned HCJ indicated his intention to hear the matter. At that juncture, the appellant's solicitors sought directions to file a formal application for the learned HCJ's recusal. The recusal application (defined in para [2] above as the 'recusal application') was filed on 25 May 2022, was premised solely on, and arose exclusively in connection with the appellant's application to intervene and expunge the impugned judgment.

[25] The reliefs sought by the appellant in the recusal application were made under s 25(2) and para 12 of the Schedule of the Courts of Judicature Act 1964 ('the CJA 1964') and/or O 92 r 4 of the ROC 2012 and/or under the inherent jurisdiction of the court for the following orders:

(a) that the learned HCJ recuse himself from hearing and disposing of the application to intervene and expunge filed by the appellant to intervene into the proceedings and to expunge the remarks made by the court against the appellant, set out in Appendix 1 of the recusal application, contained in the impugned judgment;

(b) that the application to intervene and to expunge be transferred and heard before another High Court;

(c) no orders as to costs; and

(d) such further and/or other reliefs as the court deems fit and proper to grant.

[26] The second case management was held on 13 July 2022 ('second CM') before the learned HCJ after the appellant filed the recusal application and the plaintiffs, the defendants and Telekom Malaysia ('TM') indicated that they

would maintain a neutral stance in respect of these applications and offered to act as amicus curiae. The learned HCJ had also proposed for Mr Robert Lazar to assist the court as an amicus curiae and subsequently, the Malaysian Bar applied to hold a watching brief for these applications.

[27] During the second CM, the learned HCJ had requested for counsels to submit on the following questions:

(a) whether the three applications should be heard and decided together/whether any of the applications should be disposed of first?

(b) what is the true purpose of the three applications? The judgment was not delivered in response to the appellant's conduct — it was published as a matter of public interest, and to set out the matters which have transpired in court. Wouldn't it be an abuse of process to expunge parts of a judgment, which are meant to set out true facts that transpired in court?

(c) it is part of the judicial function and duty for judges to write judgments. Wouldn't the expungement of a judgment amount to erosion of judicial power, duty, and function? Note that the applications are not to set aside the judgment but merely to expunge parts of a judgment; and

(d) are the decisions on the three applications by the appellant appealable pursuant to s 3 of the CJA 1964?

[28] The third case management was held on 12 October 2022 ('third CM'), where Mr Robert Lazar had attended in person upon invitation of the court and filed his submission note later. Filing of submissions by all parties were completed by November 2022. The learned HCJ delivered his oral decision on 30 December 2022 and his grounds of judgment were dated 20 June 2023 (defined in para [4] above as the 'application (two NAs) judgment')

DECISION OF THE HIGH COURT

[29] The learned HCJ in para 29 of the applications ('two NAs') judgment took the approach to hear the intervention application first, and with the dismissal of the intervention application, the recusal application and expunction application should fall. However, His Lordship considered the merits of the recusal and expunction application respectively before dismissing the same.

[30] The High Court dismissed all the applications ('two NAs').

[31] The learned HCJ had adopted the joint hearing approach as it would save time, effort and expense of the appellant as all the applications can be heard together at the Court of Appeal.

FINDINGS BY THE HIGH COURT

Intervention application

[32] The learned HCJ held that the appellant did not satisfy the relevant rule of O 15 r 6(2)(b)(i) and/or (ii) of the ROC 2012, and thus the court cannot invoke the inherent jurisdiction of the court under O 92 r 4 of the ROC 2012 as well. The reasons were as follows:

(a) by virtue of the statutory interpretation rule of generalia specialibus non derogant, the specific provision of O 15 r 6(2)(b) of the ROC shall prevail over the general provision of O 92 r 4;

(b) inferred from the case of *Majlis Agama Islam Selangor v Bong Boon Chuen & Ors* [2009] 6 MLJ 307 ('Majlis Agama Islam Selangor') whereby in judicial review application an intervener must satisfy the specific provision of O 53 r 8(1) and not O 15 r 6(2)(b)(i) and/or (ii). Thus, in a non-judicial review application, an intervener must fulfil O 15 r 6(2)(b)(i) and/or (ii) and cannot rely on court's inherent jurisdiction pursuant to O 92 r 4 the ROC 2012;

(c) the appellant could not satisfy the first and second limbs of O 15 r 6(2)(b) as his then clients (ie German entities) had ceased to be parties of the main suits and the appellant now no longer has any right, interest nor liability to be determined on behalf of the german entities or on his own with the parties in relation to Suit 610 and Suit 1960;

(d) *Metramac Corp Sdn Bhd (formerly known as Sykt Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501 (*Metramac Corp*) and *PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration Centre, intervener)* [2019] 4 MLJ 747 (*PCP Construction*) was distinguished by the learned HCJ as there was no discussion on O 15 r 6(2)(b); and

(e) in PCP Construction parties of the main suit had no objection to the intervention and expunction application filed by the Asian International Arbitration Centre.

Based on these premises, the intervention application was dismissed.

Expunction application

[33] The learned HCJ was of the view that the court does have inherent jurisdiction to expunge parts of a written judgment, but the onus to persuade the court to invoke such jurisdiction lies on the applicant. In this case, the appellant had failed to do so. Furthermore, the expunction application had not passed the test of expungement laid out in the cases of *Metramac Corp* and *State*

A *of Uttar Pradesh v Mohammad Nairn* AIR 1964 SC 703 ('State of Uttar Pradesh')

[34] His Lordship further contended that judicial power is exercised through judicial independence, enabling judges to adjudicate cases and render judgments in accordance with their judicial conscience, in the interest of justice, accountability, and transparency. His Lordship maintained that the impugned judgment was written in furtherance of public interest and that its issuance was a legitimate exercise of his judicial independence. The expunction application was also dismissed.

Recusal application

[35] The learned HCJ had applied the 'real danger of bias' test as laid down in eight Federal Court cases and found that the appellant had failed to establish a real danger of bias against him to hear the intervention and expunction application.

[36] As held in the case of *Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd* [2014] 10 MLJ 413 and *Ang Sue Khoon v Majlis Bandaraya Pulau Pinang & Anor* [2016] MLJU 1342, even a judge s display of impatience, annoyance, anger, sarcasm, rudeness, or sharp remarks, in itself, is insufficient to establish a real danger of bias.

[37] Moreover, the impugned judgment accurately reflects the facts and was issued to clarify the video clip, to prevent any defamation of Mr Lim Kian Leong, and to preserve his legacy. It was rendered in the public interest to uphold the proper administration of justice, particularly for members of the legal profession, including practicing advocates and solicitors.

[38] The learned HCJ dismissed the recusal application as there is no basis for the application.

Appealability of the two applications ('two NAs')

[39] Upon dismissing all the applications, the learned HCJ proceeded to hold that his decisions were not appealable to the Court of Appeal, as the dismissal of the appellant's three applications did not fall within the definition of a 'decision' under ss 3 and 67(1) of the CJA 1964.

[40] This was on the basis that the High Court's decisions stemmed from the impugned judgment which does not constitute 'rulings' made in the course of the two main suits that would have the effect of finally disposing the rights of the parties in Suit 610 and Suit 1960, respectively.

THE APPEALS BEFORE THIS COURT

[41] Both the appeals before this court concern the dismissal of the applications ('two NAs') by the learned HCJ on 30 December 2022. The crux of the applications relates to the impugned judgment.

[42] Accordingly, the issues to be determined by this court are twofold. The primary issue concerns the legal status and the appealability of the written impugned judgment and the applications ('two NAs'), as set out below.

First part: The impugned judgment

(a) what is the legal status of the impugned judgment, and does it fall within the definition of a 'decision' under s 3 of the CJA 1964; and

(b) whether the applications ('two NAs') are appealable to this court, notwithstanding that the core issue arises from the impugned judgment.

Second part: The two applications ('two NAs')

(c) whether the learned HCJ ought to have recused himself from hearing the application to intervene and expunge;

(d) whether the High Court had erred in disallowing the intervention application by a non-party to a civil suit pursuant to O 15 r 6 of the ROC 2012;

(e) whether there is a limited right to intervene by a non-party under the court's inherent jurisdiction for the sole purpose of expunging parts of the grounds of judgment (independent from O 15 r 6(2)(b)(i) and/or (ii) ROC 2012;

(f) whether the statements concerning the appellant should be expunged from the impugned judgment?

ANALYSIS AND FINDINGS

First part

What is the legal status of the impugned judgment, and does it fall within the definition of a 'decision' under s 3 of the CJA 1964

[43] First and foremost, it is pertinent to note that the impugned judgment is unique in its nature as it did not derive out of any formal application by parties to Suit 610 and Suit 1960 but rather emanates from a viral 40 second video clip of a continued trial held through remote court proceeding.

[44] Rendered independently of the disputes in the main suits, the learned HCJ maintains that he was exercising his judicial independence in issuing the judgment. His Lordship asserts that the judgment was intended to place on

record the events that had actually transpired on the day of the continued trial and that no equitable doctrine of estoppel precluded him from doing so in the interest of public.

[45] With regards to this, perhaps the impugned judgment is a 'discretionary judgment' defined by *Black's Law Dictionary* to mean 'an independent and necessary decision made in the absence of express instructions or guidance' as there is no doubt that a judge has the discretion to render a judgment on matters he deems necessary to address.

[46] His Lordship's reasons for writing the impugned judgment are elucidated at para 3 and reproduced below:

> [3] This judgment is written because the video clip has been doctored and a senior advocate and solicitor (A&S), Mr Lim Kian Leong, has been defamed as a result. *More importantly, it is in the public interest regarding the due administration of justice for members of the public, in particular practising A&S,* to be aware of the following adverse consequences in respect of the making and distribution of the doctored video clip:
>
> (i) contempt of court has been committed regarding the doctored video clip;
>
> (ii) the possible commission of an offence under s 233(1)(a)(i) of the Communications and Multimedia Act 1998 ('the CMA') of knowingly making a false 'communication' in the form of the doctored video clip;
>
> (iii) when a person knowingly transmits the doctored video clip, an offence pursuant to s 233(1)(a)(ii) of the CMA may have been committed;
>
> (iv) criminal defamation of Mr Lim Kian Leong under s 499 of the Penal Code ('the PC') has been committed;
>
> (v) with regard to the doctored video clip, Mr Lim Kian Leong may institute a civil suit for tort of defamation; and
>
> (vi) any A&S and/or pupil who is involved in the making and/or distribution of the doctored video clip may have committed a disciplinary offence under s 94(3)(o) of the Legal Profession Act 1976 ('the LPA') and may be liable for disciplinary sanction by disciplinary board ('DB') ... (Emphasis added.)

[47] Based on the reasons articulated by the learned HCJ and a reading of the impugned judgment in its entirety, it is evident that the impugned judgment was written to clarify the sequence of events. This was necessitated by the creation and dissemination of the video clip, which amounted to an act that scandalised the court and was calculated to bring the court or the learned HCJ into contempt or to undermine the learned HCJ's authority.

[48] The central question that arises is whether the impugned judgment was necessary. The appellant does not dispute the discretion or independence of the learned HCJ in writing the impugned judgment. Rather, the primary issue is the disproportionate response to a 40 second viral video clip, which resulted in a judgment serving as a commentary of the 5 1/2 hours continued trial held on 27 September 2021.

[49] Initially, only those who received the video clip were aware of the 40 second incident. However, with the publication of the impugned judgment in the law reports as well as its general accessibility, a much wider audience, including MLRH, CLJ and AMR subscribers and the public at large, became privy to all the details of the continued trial. This includes the enumeration of the appellant's seven objections and five statements, spanning pp 386–391 of the impugned judgment.

[50] There exists a factual conflict regarding whether the viral video clip was doctored. The Learned HCJ, at para 40 of the applications ('two NAs') judgment noted that the late Datuk Seri Gopal Sri Ram had submitted that the video clip was not doctored as can be found in the notes of proceeding and the transcript of the continued trial but did not accede on the point citing reasons at sub-para 40(i). Additionally, the learned HCJ identified a second reason for issuing the judgment, namely, that the late Mr Lim Kian Leong had been criminally and tortuously defamed as a result of the viral video clip. It is noteworthy that the learned HCJ may have held a particular regard for the late Mr Lim Kian Leong, as evidenced by the transcript of the CM dated 25 January 2022, where the late Mr Lim Kian Leong stated:

> ... we have all appeared before My Lord countless times, *I* do not know how many times, *and appeared with My Lord as a co-counsel*, it never occurred to any of us ... (Emphasis added.)

[51] With respect to the adverse consequences arising from the creation and dissemination of the video clip, particularly for practicing advocates and solicitors, it is acknowledged that an act of contempt did occur. However, as the identity of the wrongdoer/perpetrator remains unknown, it would be difficult to cite any individual for contempt of court. Similarly, while prosecution under the Communications and Multimedia Act 1998 ('the CMA 1998') could have been pursued, no police report was lodged by the learned HCJ in relation to the video clip to facilitate an investigation or possible prosecution under the CMA 1998. The same challenge applies to potential disciplinary action under the Legal Profession Act 1976 ('the LPA'), as the identity of the perpetrator remains undisclosed.

[52] Consequently, all the possible adverse consequences outlined are rendered otiose. Instead of taking proactive steps to ascertain the identity of the

wrongdoer and/or perpetrator, the learned HCJ directed his efforts toward the writing of the impugned judgment, citing public interest in the administration of justice as justification. It is to be assumed that this was his genuine intention, rather than an attempt to rationalise any lapse in judicial temperament on that particular day.

[53] Upon considering the goodwill reasoning set out in the impugned judgment and particularly, 'more importantly, it is in the public interest regarding the due administration of justice for members of the public, in particular practising A&S, to be aware of the following adverse consequences in respect of the making and distribution of the doctored video clip', the question arises as to whether the impugned judgment can be classified as a 'judgment in rem'. As illustrated in *Halsbury's Law of England*, where the relevant excerpt is reproduced below:

> *B. Judgments Determining Status*
>
> *1562. Meaning of 'judgment in rem'.*
>
> The term 'judgment in rem' has been judicially described as 'a specialised and somewhat misleading term of art limited to judgments concerned with status'. *A judgment in rem may be defined as the judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing, as distinct from the particular interest in it of a party to the litigation.* Apart from the application of the term to persons, it must affect the subject matter of the proceedings in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer. (Emphasis added.)

[54] Even if the impugned judgment could be classified as a valid 'judgment in rem', on the basis that it does not determine the rights of the parties in the main suit but rather serves as a notice to the world at large regarding the events of the continued trial, the main issue before this court remains on its appealability as a judgment. The learned HCJ's intention in rendering the judgment is not, in itself, determinative of its legal status or its appealability.

[55] The next question, therefore, turns on how the impugned judgment sits within our legal framework. To determine the appealability, the impugned judgment must fall within the interpretation of 'decision' in s 3 of the CJA 1964 that states:

> *'decision'* means *judgment*, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[56] Further in *Jowitt's Dictionary of English Law* (5th Ed), Vol 2: J-Z (Sweet & Maxwell, 2019), at p 1363, 'judgment' is defined as 'a judicial determination or decision of the court on the questions and issues for determination in that

proceeding. The judge gives judgment after hearing the evidence and arguments presented to him at the trial or earlier interlocutory proceeding in an action before him'. The expression is used in civil as well as criminal proceedings.

[57] Additionally, in *Osborn's Law Dictionary* (12th Ed) (Sweet & Maxwell, 2013), at p 242, 'judgment' is defined as 'the decision or sentence of a court in a legal proceeding. Also, the reasoning of a judge which leads him to his decision, which may be reported and cited as an authority, if the matter is of importance, or can be treated as a precedent'.

[58] These definitions suggest a broader concept, encompassing not only the final determination but also the reasoning that underpins the court's conclusion.

[59] In *The State of Bihar v Ram Naresh Pandey and another* AIR 1957 SC 389, the Supreme Court of India held that:

> ... the word 'judgment'... is a word of general import and means only 'judicial determination or decision of a court'. (See *Wharton's Law Lexicon*, 14th Ed, p 545).

[60] In *Dato' Seri Anwar Ibrahim v Tun Dr Mahathir bin Mohamad* [2011] 1 MLJ 145, the Federal Court held that there is a clear distinction between 'judgment' and the term 'grounds of judgment' or 'reasons for judgment' and referred to the *Law Lexicon* cited by the appellant which defined 'judgment' as follows:

> 'Judgment' means the statement given by the judge on the grounds of a decree or order. (CPC (5 of 1908), S.2 (9)). The sentence of the law, or decision pronounced by the court, upon the matter contained in the record. (3 Comm 395, c 24 Tomlin). A judgment in the final determination of the rights of the parties in an action.
>
> A 'judgment' is a sentence of the law pronounced by the Court upon the matter contained in the record (Co LIYY 39 A, 168 A); and the decision must be one obtained in an ACTION Ex p Chinery 12 QBD 342; *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465.
>
> (*In a proper use of terms, the only judgment given by a court is the order it makes. The reasons for judgment are not themselves judgments, though they may furnish the court's reason for decision and thus form a precedent* (*R v Ireland* (1970) 44 ALJR 263)). See also *Lake v Lake* [1955] 2 All ER 538, para (8) Infra. (Emphasis added.)

[61] The Court of Appeal in *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan Bhd v Majlis Perbandaran Pulau Pinang* [1996] 2 MLJ 697 ('Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor') had to answer the issue on whether the grounds of decision supplied by the judge after the filing of the notice of appeal constituted a judgment and Mahadev

Shanker JCA in delivering the Court of Appeal judgment at pp 723–724 stated that:

> ... Subject to correction, the supply of grounds or reasons for judgment has not been specifically spelt out in the Courts of Judicature Act 1964 ('the Judicature Act') or for that matter in the Rules of the High Court 1980 ('the Rules'). In the Judicature Act, s 94 requires the delivery of judgments of the Federal Court in open court, O 42 r 1 of the Rules has made the same requirement. *In ordinary and even legal parlance, a 'judgment' is taken to mean both the intellectual process of arriving at a decision for the resolution of a dispute as well as the decision itself.* Order 42 r 5 states that if in the case of any judgment a form thereof is prescribed in Form 79, the judgment must be in that form. If by a judgment we mean the written statement containing the facts found, the inferences made and the law applied in coming to a verdict, then 'judgment or order' clearly do not mean the same thing. *The term 'grounds of decision' comes into play only when notice of appeal has been filed* (see O 49 r 2(3) of the Subordinate Court Rules 1980, r 18(4)(e) of the Rules of the Court of Appeal 1994 and r 57(4)(e) of the Rules of the Federal Court 1995). These rules are not similarly worded so far as the High Court is concerned. It is clear that a 'written judgment' when juxtaposed with 'grounds of decision' does not mean the same thing as the 'judgment, decree or order appealed from' which has to be separately attached under r 18(4)(d). (Emphasis added.)

[62] Thus, a 'written judgment' and 'grounds of decision' under r 18(4)(e) of the Rules of the Court of Appeal 1994 ('the RCA 1994') do not mean the same thing as the 'judgment, decree or order appealed from' under r 18(4)(d) of the RCA 1994. Hence, the term 'judgment' when used in the context of the latter category denotes only the outcome ie relief granted or sentence passed in a particular case while the term 'judgment', when it appears in the context of the former category covers the reasoning ie the grounds or basis on which the court came to its decision. It should be noted that Mahadev Shankar JCA recognised that the ordinary and legal meaning of the term 'judgment' includes not just the decision itself but the process undertaken to arrive at such a decision.

[63] The term 'judgment' was further defined in the case of *Dharshini a/p Ganeson v Doraisingam a/l Thambyrajah* [2020] MLJU 737 at para 16, where the Court of Appeal held that:

> [16] Every judgment is a decision obtained in an action, and every other decision is an order. See: *Onslow v Commissioners of Inland Revenue* (1890) 25 QBD 465 (CA). Thus, the variation order is clearly an order or judgment that comes under O 42 r 1 of the Rules of Court 2012 as it had disposed of the petitioner wife's application in encl 11. And there is a clear distinction between 'judgment' and the term 'grounds of judgment'. See: *Dato' Seri Anwar Ibrahim v Tun Mahathir bin Mohamad* [2011] 1 MLJ 145 (FC). *'Judgment' is the formal order made by the court that disposes of or deals with the issues in the proceedings before the court. Whilst 'grounds of judgment' would be the reasons for the 'judgment'. The distinction is material and important. The fundamental principle is that a party may appeal against the 'judgment' and not against some findings or statements which may be found in the reasoning or 'grounds of*

judgment'. See: *Lake v Lake* [1955] 2 All ER 538. (Emphasis added.)

[64] It is clear from the cases cited above that a judgment or order is the specific decision that can be enforced within the legal framework of the ROC 2012 and other related statutory instruments. A finding of facts or conclusions of law by the judge trying the case, or his decision of a controverted point or opinion upon the matters submitted, whether oral or in writing, does not constitute a judgment and is therefore not enforceable.

[65] Within the legal framework of the ROC 2012, O 42 deals with 'judgment and orders' and O 42 r 1(1) and (2) of the ROC is specifically on delivering judgment, which is below:

Delivering judgment (O 42 r 1)

(1) *Every judgment, after the hearing of a cause or matter in open Court*, shall, subject to paragraphs (3) and (4), *be pronounced in open Court* either on the conclusion of the hearing or on a subsequent day of which notice shall be given to the parties.

(2) *Where a cause or matter is heard in Chambers, the Judge hearing it may*, subject to paragraphs (3) and (4), *pronounce the judgment in Chambers*, or, if he thinks fit, in open Court ... (Emphasis added.)

The above provisions, in essence, provide that after the hearing of a cause or matter either in open court or in chambers, judgment shall be pronounced accordingly.

[66] The words 'cause' and 'matter' are defined in s 3 of the CJA 1964 as follows:

... 'cause' includes any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding;

'matter' includes every proceeding in court not in a cause; ...

[67] With respect to the term 'proceeding', the Federal Court in *Dato' Seri Anwar Ibrahim* considered whether the term 'proceeding' under s 8 of the National Language Acts 1963/67 encompassed the 'grounds of judgment' of the court. The court observed that the definition of 'proceeding' includes, among other things, the institution or commencement of an action, judgment, execution, and the taking of an appeal or writ of error. While 'judgment' falls within this definition, the court distinguished between the terms 'judgment', 'grounds of judgment', and 'reasons for judgment', concluding that 'proceedings' could not be construed to include 'grounds of judgment'.

[68] A plain reading of O 42 r 1 of the ROC 2012 suggests that the impugned judgment did not arise from the hearing of any cause or matter properly before the learned HCJ. Furthermore, it does not contain any specific decision capable of enforcement within the legal framework of the ROC 2012.

[69] It is also necessary to examine the structure, content, and context of the impugned judgment. Merely designating a document as a 'judgment' does not, in itself, confer upon it the legal status of a judgment. An analysis of its structure reveals that the impugned judgment lacks reasoning or ratio decidendi and consists primarily of obiter dicta of factual findings and the learned HCJ's determination concerning the video clip, which forms the central point of contention in this case.

[70] A sound judgment must have ratio decidendi or reason of the decision, which is an essential part of a judgment (see GS Karkara & S Malik, *Art of Writing Judgments: Law and Practice, Law Publishers (India) Private Limited*, 1993; p 44). It must incorporate the court's reasoning and provide a detailed exposition of the judicial thought process in reaching its decision as defined by Jowitt and Osborn and further asserted by Mahadev Shankar JCA in *Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor*. It is our respectful view that the impugned judgment does not embody these essential characteristics. Thus, it can be concluded that in the absence of all the essential characteristics, the impugned judgment is not a legally binding judgment nor can it be construed as a 'decision' within the meaning of s 3 of the CJA 1964.

Whether the applications ('two NAs') are appealable to this court, notwithstanding that the core issue arises from the impugned judgment

[71] In contrast to the impugned judgment authored by the learned HCJ, which did not originate from any formal legal 'cause' or 'matter' properly before the court, the applications ('two NAs') filed by the appellant were brought in accordance with O 32 r 1 of the ROC 2012. As such, there are no procedural irregularities concerning the applications. Consequently, formal orders for the applications ('two NAs') were duly drawn up and are appended to the appeal record.

[72] In determining the appealability of the applications ('two NAs') before this court, it is necessary to consider three key provisions within the CJA 1964, namely ss 67, s 68, and 3. For ease of reference, the relevant provisions are reproduced below.

> 67 *Jurisdiction to hear and determine civil appeals*
>
> (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from *any judgment or order of any High Court in any civil cause or matter, whether made in*

the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

(2) The Court of Appeal shall have all the powers conferred by section 24A on the High Court under the provisions relating to references under order of the High Court;

68 *Non-appealable matters*

(1) No appeal shall be brought to the Court of Appeal in any of the following cases:

(a) when the amount or value of the subject-matter of the claim (exclusive of interest) is less than two hundred and fifty thousand ringgit*, except with the leave of the Court of Appeal;

(b) where the judgment or order is made by consent of parties;

(c) where the judgment or order relates to costs only which by law are left to the discretion of the Court, except with the leave of the Court of Appeal; and

(d) where, by any written law for the time being in force, the judgment or order of the High Court, is expressly declared to be final.

(2) (Deleted by Act A886)

(3) No appeal shall lie from a decision of a Judge in Chambers in a summary way on an interpleader summons, where the facts are not in dispute, except by leave of the Court of Appeal, but an appeal shall lie from a judgment given in court on the trial of an interpleader issue.

3 Interpretation

In this Act, unless the context otherwise requires —

...

'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties; ... (Emphasis added.)

[73] The interpretation of the above sections of the CJA 1964 has been the subject of judicial consideration on numerous occasions, employing both literal and purposive approaches. In the context of civil proceedings, the Federal Court has established key principles regarding the appealability of interlocutory applications from the High Court in cases such as *Kempadang Bersatu Sdn Bhd v Perkayuan OKS No 2 Sdn Bhd* [2019] 4 MLJ 614 and *Asia Pacific Higher Learning Sdn Bhd (registered owner and licensee of the higher learning institution Lincoln University College) v Majlis Perubatan Malaysia & Anor* [2020] 2 MLJ 1.

[74] The learned HCJ in his applications ('two NAs') judgment had stated two grounds of the non-appealability of the applications ('two NAs'), which are:

(a) the applications ('two NAs') emanate from the impugned judgment; and

(b) that the applications ('two NAs') are not 'rulings' made in the course of the trial of the main suits, which would finally dispose of the rights of the parties in the main suits.

[75] To disprove the first reason by the learned HCJ, the case of *Re Mohamad bin Hitam; ex p Am Finance Bhd (previously known as MBf Finance Bhd)* [2006] 2 MLJ 744 had deliberated that a judge or registrar hearing the application is neither required nor entitled to travel beyond the specified grounds relied by the parties. Low Hop Bing J at paras 16–17 stated:

> [16] In my view, the JD's application is regulated by O 32 r 1 of the Rules of the High Court 1980. Such an application must be made by way of summons in chambers in Form 62 which contains the following words: The grounds of application are (state the ground).
>
> [17] The abovesaid words are included in Form 62 for a specific purpose. They specifically require the grounds to be stated. Form 62 is analogous to the parties' pleadings by which the parties are bound. Parties are not at liberty to go beyond the grounds other than those stated in Form 62. *The judge or registrar hearing an application in Form 62 is neither required nor entitled to travel beyond the specified grounds relied on by the parties, otherwise, the issues will proliferate ad infinitum and chaos in litigation may prevail* ... (Emphasis added.)

[76] It could be inferred from the foregoing authority that the applications ('two NAs') are governed by O 32 and Form 57 of the ROC 2012. Thus, there should be no requirement for the court to look beyond the notice of application, including the legality of the impugned judgment, for the applications ('two NAs') to be accepted as valid legal applications capable of being considered for appeal before this court. What is currently before this court is not the impugned judgment, but rather the applications ('two NAs'), which were duly filed by the appellant in accordance with the legal framework set out in the ROC 2012.

[77] As for the second reason, it is settled law in the case of *Kempadang Bersatu* that s 67(1) of the CJA 1964 must be read together with s 3 of the same Act. In the present case, the appeals before this court originate from a valid legal order arising from two legally valid notices of application that were heard and disposed of by the learned HCJ. It is important to highlight that the applications ('two NAs') do not constitute interlocutory applications connected to the main suits but were instead filed independently and distinct

from the main suits and hence, should be regarded as an order rather than a ruling.

[78] This is to distinguish the findings in *Datuk Seri Tiong King Sing v Datuk Seri Ong Tee Keat & Anor* [2015] 1 MLJ 847, which presents the closest factual scenario to the case presently before this court. In that case, during the trial of a defamation suit, a witness declined to disclose the identity of the 'sources' cited in the defamatory article. Consequently, the plaintiff filed an application seeking an order to compel the witness to reveal the names and particulars of the said 'sources'. The High Court dismissed the application, prompting the aggrieved party to file an appeal. The Court of Appeal held that the plaintiff's appeal was incompetent and thus non-appealable. It held at para 10 that:

> [10] It is true that in the present case, the plaintiff caused to be filed a formal application (encl 35) to require Joseph Sipalan to disclose the identity of the 'sources' and that this application was supported by an affidavit and replied through affidavit as well. Joseph Sipalan is no longer a party to the plaintiff's defamatory action. He was merely a witness. An important point which must not be overlooked is that encl 35 was filed and then determined by the learned High Court judge during the course of the trial, even as Joseph Sipalan was in the midst of giving his testimony. Viewed in this way, the fact that a formal application was filed should not make any difference to the matter at hand. What is of greater significance is at what juncture the said ruling was made? We agree with the submissions of learned counsel for Joseph Sipalan and the fourth defendant that in substance what was sought was a ruling by the learned High Court judge in the course of the trial as to whether Joseph Sipalan should be compelled to disclose the identity of the 'sources' ...

[79] In the aforementioned case, the order in encl 35 was regarded as a ruling due to the nature of the application filed by the plaintiff and the fact that Joseph Sipalan was a witness testifying in the course of a trial. In contrast, the applications ('two NAs') in the present matter were not filed by the plaintiffs, the defendants, or any other party to the main suits but rather by a third party, namely, the appellant, who was counsel for the German entities, who were former defendants in the main suits. Neither the plaintiffs nor the defendants are involved in the present appeal, save for the Malaysian Bar's representative, who has agreed to continue as amicus curiae. Furthermore, the application before this court bears no relation to the trial, and the proceedings in the main suits could continue without delay or disruption. Hence, it could be said that the application and orders of the applications ('two NAs') are not made 'in the course of a trial' as 'trial' in this sense would mean of the main suits, ie Suit 610 and Suit 1960.

[80] The primary issue for determination concerning their appealability is whether the order was made 'in the course of a trial' and whether it 'disposes of the rights' of the parties in the main suits. The general rule would be 'if an order

was not made in the course of a trial or matter, regardless of the fact that it does not dispose of the rights of the parties, such an order is not a ruling as defined in s 3 of CJA 1964 and is therefore appealable' as per decided by the Court of Appeal in the case of *Syarikat Tingan Lumber Sdn Bhd v Takang Timber Sdn Bhd* [2003] 2 MLJ 495.

[81] This rule is legal principle can be seen reflected in the case of *Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals* [2017] 3 MLJ 350, the Court of Appeal held that a recusal order made by the judge before the commencement of trial is not a ruling within s 3 of the CJA 1964, and is thus appealable.

[82] Even in the case of *Kempadang Bersatu*, the Federal Court found that the order of the learned judicial commissioner remitting the case to a different deputy registrar for damages to be reassessed was not a ruling as described in s 3 of the CJA 1964 as it was issued at the end of the hearing of *Kempadang*'s appeal and not in the course of the hearing of the appeal.

[83] As for whether the applications ('two NAs') 'disposes of the rights' of the parties in the main suits, it is imperative to note that not all orders issued by a court pursuant to interlocutory applications filed during the course of a trial are necessarily non-appealable. In *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals* [2017] MLJU 445, the court held that the trial judge's decision dismissing an application to strike out pleadings under O 18 r 19 of the ROC 2012 did not constitute a 'ruling' within the meaning of s 3 of the CJA 1964, notwithstanding that the application was filed during the trial.

[84] In light of the ratio established in *Mulpha International Bhd & Ors v Mula Holdings Sdn Bhd & Ors and other appeals*, it can be inferred that the applications ('two NAs') are not applications intended to delay the trial of the main suit. These applications do not, in any manner, dispose of the rights of any parties in the main suits.

[85] Furthermore, the subject matter of the applications ('two NAs') does not fall within the category of non-appealable matters as enumerated under s 68 of the CJA 1964, and therefore, cannot be rendered non-appealable before this court.

[86] In conclusion, the applications ('two NAs') constitute orders that were neither made in the course of trial nor do they involve a hearing or determination that disposes of the rights of the parties. Furthermore, even without a conjoint reading of s 3 with s 67(1) of the CJA 1964, the applications

('two NAs') remain appealable, as they do not fall within the category of non-appealable matters under s 68 of the CJA 1964.

Second part

Whether the High Court had erred in disallowing the intervention application by a non-party to a civil suit pursuant to O 15 r 6 of the ROC 2012

Whether there is a limited right to intervene by a non-party under the court's inherent jurisdiction for the sole purpose of expunging parts of the grounds of judgment (independent from O 15 r 6(2)(b) (i) and/or (ii) ROC 2012

[87] The learned HCJ at para 23 of His Lordship's the applications ('two NAs') judgment held that in deciding an application by a person to intervene in court proceedings (not a judicial application):

(a) only O 15 r 6(2)(b) of the ROC 2012 is relevant; and

(b) the court cannot invoke O 92 r 4 of the ROC 2012, the court's inherent jurisdiction and/or power to decide an intervention application.

[88] Before proceeding further, it is pertinent to note that the learned HCJ had erred in relying on the Federal Court decision in *Majlis Agama Islam Selangor* while it is a binding precedent, the case pertains to judicial review proceedings, which are governed by specific provisions under O 53 r 8 of the ROC 2012 and therefore the general intervening provision under O 15 r 6(2)(b) cannot be invoked. It should be viewed in that context.

[89] The facts of the *Majlis Agama Islam Selangor* case are also distinguishable on the facts. The appellant, Majlis Agama Islam Selangor, was refused to intervene in the judicial review proceedings by the High Court. The Court of Appeal affirmed the High Court's refusal to grant leave, but further stated that O 15 r 6(2)(b) of the Rules of High Court 1980 ('the RHC 1980') does not apply to judicial review proceedings.

[90] Further, in the Federal Court, a distinction was made between O 53 of the RHC 1980, which was a specific framework for the determination of applications for judicial review, and O 15 r 6(2)(b), the more general basis for intervention. The Federal Court then went on to hold that the maxim 'generalia specialibus non derogant' is applicable and O 53 of the RHC 1980 should prevail and O 15 r 6 (2)(b) cannot be invoked.

[91] The issue of 'inherent jurisdiction' was also raised, however, the Federal Court cited the case of *Permodalan MBf Sdn Bhd v Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178 and was of the view that the inherent

jurisdiction of the court cannot be invoked to override O 53 r 8(1) of the RHC 1980 as there was already a specific clause allowing proper persons to be added as a party to judicial review proceedings.

[92] Since *Majlis Agama Islam Selangor* was not a 'proper person' within the ambit of O 53 r 8(1) and therefore *Majlis Agama Islam Selangor* was not allowed to intervene. There was no necessity to rely on the inherent jurisdiction of the court to allow *Majlis Agama Islam Selangor* to intervene, as they did not have a direct interest in the judicial review proceedings. As such, its applicability to the present matter, which concerns an application for intervention pursuant to O 15 r 6(2)(b) of the ROC 2012, is misplaced.

[93] Applying the approach taken by the learned HCJ, if the route to intervention is limited only to O 15 r 6(2) of the ROC 2012, it would follow that a non-party (the appellant in this case) who is aggrieved by critical statements made against him in the impugned judgment would be left completely without recourse. It cannot be the case that the party is without remedy, particularly in the appellant's case. It is also pertinent to note that the application to intervene by the appellant was also made and/or under the inherent jurisdiction of the court. We are of the considered view that the learned HCJ should not have applied O 15 r 6(2)(b) of the ROC 2012 as it was not applicable to the circumstances of this case and is entirely unsuitable and left the appellant without a procedural avenue to seek redress.

[94] Since O 15 r 6(2)(b) of the ROC 2012 is not applicable, the learned HCJ ought to have invoked the court's inherent jurisdiction and allowed the appellant to intervene in Suit 610 and Suit 1960. The learned HCJ had wrongly applied the maxim generalia specialibus non-derogant and held that the specific provision O 15 r 6(2)(b) of the ROC 2012 should prevail over the general provision of O 92 r 4 of the ROC 2012.

[95] In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at pp 237–238, the Federal Court held that O 92 r 4 of the RHC 1980 is not a 'general provision'. The powers conferred by the ROC are additional to and not in substitution of the powers arising out of the inherent jurisdiction of the court. The court can exercise its inherent jurisdiction even in matters which are regulated by statute or by the ROC.

[96] In explaining the nature and basis of the court's inherent jurisdiction and its applicability, Edgar Joseph Jr FCJ in *R Rama Chandran*'s case referred to 'The Inherent Jurisdiction of the Court [1970] Current Legal Problems by Sir Jack Jacob QS'. His Lordship said this;

Explaining the nature of inherent jurisdiction, the learned author said this (at p 24):

> *... The court may exercise its inherent jurisdiction even in matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision ...*

The learned author then distinguished between the internet jurisdiction and the statutory jurisdiction, as follows (at p 24):

> The source of the statutory jurisdiction of the court is, of course, the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas *the source of the inherent jurisdiction of the court is derived from its nature as a court of law;* so that the limits of such jurisdiction are not easy to define, and indeed appear to elude definition.

The learned author then directs attention to the point that *the powers conferred by the rules of court are generally additional to and not in substitution of the powers arising out of the inherent jurisdiction of the court,* in these terms (at p 25):

> *The inherent jurisdiction of the court may be exercised in any given case, notwithstanding that there are rules of court governing the circumstances of the case.* The powers conferred by rules of court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the court. The two heads of power are generally cumulative, and not mutually exclusive, so that in any given case, the court is able to proceed under either or both heads of jurisdiction.

Explaining the juridical basis of inherent jurisdiction, the learned author says this (at p 27):

> *... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason, such jurisdiction has been called 'inherent'.* This description has been criticized as being 'metaphysical', but I think nevertheless that it is apt to describe the quality of this jurisdiction. *For the essential characters of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused.* Such power is intrinsic in a superior court; it is its very life-blood, its very essence, its immanent tribute. *Without such a power, the court would have form but would lack substance.* The jurisdiction which is inherent in a superior court of law is that which enables it to fulfil itself as a court of law.

Defining inherent jurisdiction, the learned author said this (at p 51):

> *... the inherent jurisdiction of the court may be defined as being reserved or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.*

In explaining the usefulness of the inherent jurisdiction, the learned author said this (at pp 50–51):

> *On the other hand, where the usefulness of the powers under the Rules ends, the*

A *usefulness of powers under inherent jurisdiction begins.* This is shown under three important respects in which the powers arising out of inherent jurisdiction differ from those conferred by Rules of Court. *First, perhaps by their very nature, they are wider and more extensive powers, permeating all proceedings at all stages and filling any gaps left by the Rules and they can be exercised on a wider basis, for example, by*
B *enabling the court to admit evidence by affidavit or otherwise in order to examine all the circumstances appertaining to the merits of the case. Secondly, they can be invoked in respect of persons who are not themselves actual litigants in pending proceedings.* Thirdly, they can be used to punish the offender by fine or imprisonment. (Emphasis added.)

C

[97] A plain reading of the nature and the usefulness of inherent jurisdiction as described in *R Rama Chandran*'s case, the court's inherent jurisdiction is wider and more extensive, and can fill any gaps left by the rules and can be invoked in respect of persons who are not themselves litigants in the
D proceedings. In such circumstances, to say that whenever there is a rule, the inherent jurisdiction is ousted, in our view, is misplaced.

[98] The learned HCJ in his grounds of judgment at paras 23(c) and
E (d) made reference to cases *Metramac Corp Sdn Bhd* and *PCP Construction* and pointed out that O 15 r 6(2)(b) was not discussed as to its applicability. With respect, even though both cases did not refer to O 15 r 6(2)(b), nor contain any discussion on the applicability of this provision, it nevertheless demonstrates the court's willingness in its inherent jurisdiction and/or power to allow a
F non-party to a proceeding who has been aggrieved by the grounds of judgment, to intervene in the very proceedings to expunge the said grounds of judgment. On that note, we are of the view that the learned HCJ ought to have been guided by these decisions of the Federal Court.

G **[99]** The impugned judgment contains heavily critical remarks regarding the appellant's conduct during the continued trial. In fact, the learned HCJ went as far as to state that His Lordship would consider whether to lodge a complaint with the disciplinary board regarding the appellant's conduct and statement. The appellant was thus aggrieved as his reputation had been affected by the
H impugned judgment.

[100] It is our respectful view that the learned HCJ ought to have found that the appellant was aggrieved by the impugned judgment and, in doing so, ought to have invoked the court's inherent jurisdiction and allowed the appellant to
I intervene in Suit 610 and Suit 1960.

[101] Notably, in the present case, the appellant's intervention application was filed solely for the purpose of expunging the written impugned judgment, and it is of particular significance that none of the parties to Suit 610 and

Suit 1960 raised any objections to the application. Accordingly, the general rule governing intervention applications dictates that where no relief is sought against the plaintiff and there are no objections from the parties to the main suits, such an application ought to be allowed. Moreover, where there is an attack on the character of the proposed intervener, as is the case with the appellant in the impugned judgment, the necessity for intervention is further reinforced to safeguard the proposed intervener's reputation and to ensure that justice is served.

[102] In this regard, notwithstanding any goodwill intention on the part of the learned HCJ, the statements made in the impugned judgment, from the perspective of a reasonable observer, may have adversely affected the appellant's good name and reputation as a senior member of the legal profession. A pertinent question arises as to whether it is fair for the learned HCJ to have been concerned solely with preserving the good name and reputation of the late Mr Lim Kian Leong, without extending the same consideration to all counsels who had appeared before him on the day of the continued trial, including the appellant.

[103] This raises a crucial point for reflection, as judicial impartiality demands equal fairness to all legal practitioners appearing before the court. Furthermore, the gravity of the impugned judgment is compounded by the fact that it contains express statements by the learned HCJ indicating his intention to lodge a complaint with the disciplinary board against the appellant's conduct.

[104] The case of the appellant is distinguishable, as he is an aggrieved party in respect of the impugned judgment, which has been published despite lacking the legal status of a judgment. The subject matter of the appeal is identical to that before the High Court, and there exists a direct legal interest warranting consideration by this court in the exercise of its powers. In light of these circumstances, the intervention application ought to have been allowed.

Whether the statements concerning the appellant should be expunged from the impugned judgment?

[105] With regards to this issue, the Court of Appeal is bound by two of the Federal Court cases that is *Metramac Corp Sdn Bhd* and the case of *PCP Construction*.

[106] In *Metramac Corp*, in paras [156]–[163], the Federal Court referred to the court's inherent jurisdiction to allow intervention by non-litigants for the limited purpose of seeking an order to expunge offensive statements. It held that a court may invoke its inherent jurisdiction to issue any order necessary to

prevent injustice or to avert an abuse of the court's process. This inherent power extends to the expunction of remarks, statements within a judgment, or even the judgment in its entirety, where warranted. Paragraphs 156–163 are reproduced as below;

'JURISDICTION OF THE COURT'

[156] Actually, jurisdiction of this court to make an order to expunge offensive statements is not an issue before us. First, this court, in allowing Tun Daim and Tan Sri Halim Saad ('the interveners') to intervene in these appeals for that purpose, was already satisfied that this court had the threshold jurisdiction to make such an order.

[157] Secondly, this court has repeatedly held that it has the inherent jurisdiction 'to make any order that may be necessary to prevent injustice or to prevent any abuse of the process of the court'. See *Chia Yan Tek & Anor v Ng Swee Kiat & Anor* [2001] 4 MLJ 1; *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M) Bhd* [2002] 1 MLJ 385; *MGG Pillai v Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 2 MLJ 673 and *Allied Capital Sdn Bhd v Mohd Latiff bin Shah Mohd, & Another Application* [2005] 3 MLJ 1.

[158] Thirdly, at least on two occasions, courts in this country had expunged remarks made in a judgment. The first is *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors* [1995] 2 MLJ 833 (FC). The other case is *Phileo Promenade Sdn Bhd & Anor v Premier Model (M) Sdn Bhd* [2003] 2 MLJ 159 (CA).

[159] In *Insas Berhad* or better known as the 'Ayer Molek Case', the Federal Court expunged offensive remarks made by the Court of Appeal in its judgment against the High Court, the applicants and their counsel. Jurisdiction was not in issue in that case and the Federal Court did not even make any mention of it.

[160] In *Phileo Promenade*, the Court of Appeal expunged three paragraphs from the judgment of the High Court. In that case too, jurisdiction of the court, ie, the Court of Appeal, was not in issue and no mention was made in the judgment of the Court of Appeal on the question of jurisdiction. It was accepted by all that the Court had the jurisdiction to do so.

[161] Fourthly, in this case too, learned counsel for Fawziah Holdings (the respondent) did not raise any objection to the application on ground of want of jurisdiction. It was only the learned counsel for the interveners who, out of caution, submitted on the question of jurisdiction of this court to make the expunging order

[162] The Supreme Court of India, too, has on occasion exercised its inherent jurisdiction to expunge comments of the lower courts, An example is the *State of Uttar Pradesh v Mohammad Nairn* AIR 1964 SC 703. That case was also cited in *Insas Bhd* and *Phileo Promenade*.

[163] In the circumstances, I do not think it is necessary to dwell at length on the issue of jurisdiction of this court to make the expunging order. Suffice to say that this court has the jurisdiction to do so if circumstances warrant it to do so.

[107] In *Metramac Corp*, the Federal Court not only discussed on jurisdiction of the court but also the test that is applicable for expungement. In para 165 of

the judgment, it was held as follows:

> [165] In *State of Uttar Pradesh v Mohd Nairn*, SK Das J, delivering the judgment of the court, said that in such cases, it is relevant to consider
>
> (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself;
>
> (b) whether there is evidence on record bearing on that conduct justifying the remarks; and
>
> (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct.

[108] Further, to justify the test above, the Federal Court in *Metramac Corp* also stated that in considering the abovementioned test, the court has to consider whether the statements, on the face of it, are offensive, objectionable, disparaging, unjust or unjustified.

[109] In applying the test above, prior to preparing the written impugned judgment, the appellant was not given the opportunity to explain or defend himself and this acknowledged by His Lordship in para 38(2)(a) of the written judgment for a reason that the appellant was not the subject matter of the impugned judgment. This constitutes a clear breach of natural justice. It is our respectful view that the learned HCJ has failed to see that, due to His Lordship's remarks about the appellant's conduct, the appellant has been aggrieved by the impugned judgment as it negatively affects his reputation.

[110] Based on the circumstances of the case, we find that the appellant's case has met the threshold of the test stated and the statement made by the learned HCJ in the impugned judgment concerning the appellant's conduct falls within the *Metramac Corp* categories. Similarly, at para [94] of *PCP Construction*, the Federal Court affirmed that there is no procedural irregularity or objection in granting an expunction order to remove remarks that are prejudicial or detrimental to a party, such as the AIAC in that case.

[111] Coming back to the appellant's case before us, we observed that:

(a) the impugned judgment appears to be in effect a 'written judgment' or 'grounds of decision';

(b) the impugned judgment also appears not in justification of any 'judgment' or 'order' that was ever pronounced by the learned HCJ;

(c) there appears to be no 'cause' or 'matter' in the legal sense before the learned HCJ for His Lordship to come to a 'decision' vis a vis the impugned judgment;

(d) the video clip was never a subject matter of any pending lis or dispute before the High Court;

(e) the impugned judgment and the remarks regarding the appellant's conduct had no bearing on the outcome of Suit 610 and Suit 1960 and had no relation at all to the disputes in Suit 610 and Suit 1960. In fact, the learned HCJ had assured parties that the video clip would not affect His Lordship's ability to decide justly on the dispute in Suit 610 and Suit 1960;

(f) next, despite claiming to have written the impugned judgment due to 'public interest', the learned HCJ chose not to pursue the matter any further, as he acknowledged subsequently in the impugned judgment that there was no public interest in lodging a complaint against the appellant;

(g) at the CM on 25 January 2022, the learned HCJ concluded that he had 'considered the matter closed' and it was no longer an issue in dispute, particularly the video clip matter;

(h) the impugned judgment was written after the matter had been considered closed. The purpose of writing the impugned judgment was to provide clarity and context to the video clip, which occurred after the events shown in the video clip. We agree with the learned counsel for the appellant's submission that the learned HCJ ought not to have referred to matters occurring subsequent to the viral clip;

(i) a comparison of the contents of the video clip and the notes of proceedings of the continued trial showed that the viral clip was not manipulated or tampered with in any manner and the contents of the video clip were accurate. The outburst did take place as a matter of fact;

(j) the impugned judgment was not a mandatory judgment rendered in the ordinary course of the learned HCJ's judicial duties. Rather, it constituted an extraordinary or extraneous measure beyond the cause or matter properly before him. Furthermore, in elucidating the events that transpired during the continued trial, the mere provision of the notes of proceedings would have sufficed. There was no necessity to include commentaries or justifications in response to the 40 second video clip within a judgment; and

(k) in the circumstances of the fact, the entire impugned judgment was unnecessary and served no purpose other than to justify the 'outburst'.

Hence, we are of the view that it was not open to the learned HCJ to write a 'written judgment' or 'grounds of decision' on a matter extraneous to the 'cause' or 'matter' before him.

[112] There was a clear abuse of process when the learned HCJ authored the impugned judgment ultra vires his judicial authority, as the matter was neither a cause nor an issue properly arising within the main suits before him. This constituted a breach of natural justice against the appellant, who was deprived of the opportunity to respond to the impugned judgment. There was no necessity to write the impugned judgment in the first place.

[113] The impugned judgment sets an unbecoming precedent in that critical comments against a non-party to a proceeding could be made in written judgments, and the said non-party would have no recourse to justice if they were aggrieved by the judgment. Applying the test for expungement as laid down in *Metramac Corp*, we are satisfied that the appellant has satisfied the same. Accordingly, the appellant's application for the expunction of the impugned judgment ought to have been allowed, with this court invoking its inherent jurisdiction to do so.

Second part

Whether the learned HCJ ought to have recused himself from hearing the application to intervene and expunge

[114] It is imperative to note that the recusal application sought by the appellant pertains specifically to his application to intervene and expunge the impugned judgment and bears no relation to Suit 610 or Suit 1960. The factual matrix of the present case is highly distinct and must be carefully distinguished from most, if not all, of the established authorities on judicial recusal.

[115] In the case of *Wong Kie Chie & Ors v Kathryn Ma Wai Fong (as the personal representative, executrix and trustee of the estate of the late Wong Kie Nai) & Anor and other appeals* [2017] 3 MLJ 350, the Court of Appeal had elucidated an overview of the law on judicial recusal as follows:

> ...
>
> ...
>
> LAW ON JUDICIAL RECUSAL — AN OVERVIEW
>
> [12] Upon ascending the bench, every judge of the superior courts in Malaysia takes an oath to discharge his judicial duties honestly and impartially to the best of his ability. As such, judges are duty-bound to make decisions according to law, uninfluenced by personal bias, conflict of interest, without fear or favour, affection or ill-will or prejudice. Accordingly, a judge's duty to act honestly and impartially is a defining feature of, and one of the most fundamental principles which is naturally intrinsic to the judge's role in the administration of justice.
>
> [13] The doctrine of judicial recusal dictates that a judge may recuse himself from proceedings if he decides that it is not appropriate for him to hear a case. A judge

may recuse himself when a party applies for him to do so and he must step down where there appears to be actual or apparent bias (Judicial Recusal, Masood Ahmad, University for Leicester, The Law Society Gazette). Thus, when the impartiality of a judge is in doubt, the appropriate remedy is to disqualify the judge from hearing further proceedings in the matter.

[14] The primary source of recusal law in Malaysia is the English common law. Be that as it may, it is pertinent to note that the Judges' Code of Ethics 2009 ('the Code') sets out the basic standards to govern the conduct of all judges and it provides guidance in setting and maintaining high standards of personal and judicial conduct. In essence, the Code elucidates the inherent characteristics of the judges' role in the administration of justice and encapsulates the principles that a judge should decide a case according to law and without bias, must be impartial and act independently uninfluenced by all considerations extraneous to the particular case: s 5 of the Code ...

[116] It further held at para 16:

... [16] *Under English common law, the accepted basis for judicial disqualification began with financial or pecuniary interest, that is, where a judge sitting in a judicial capacity has a pecuniary or proprietary interest in the outcome of the proceedings. Similarly, on proof of such interest, the existence of bias is effectively presumed and as such gives rise to automatic disqualification. This is because the existence of such circumstances are such that they must inexorably shake or undermine public confidence in the integrity of the administration of justice and may bring the justice system into disrepute if the decision is allowed to stand*. In such cases, not only is it irrelevant that there is in fact no bias on the part of the judge, but there is no question of investigating whether there is any real likelihood of bias, or any reasonable suspicion of bias, in the facts of the particular case, The nature of the interest is such that public confidence in the administration of justice requires that the judge concerned should recuse himself from hearing the case lest the decision should not stand (*The King v Sussex Justices ex parte McCarthy* [1924] 1 KB 256; ; [1923] All ER Rep 233; *Regina v Gough* [1993] AC 646; [1993] 2 WLR 883; *William Dimes v The Proprietors of the Grand Junction Canal, Skidmore, A Boham, and WW Martin* (1852) 10 ER 301; [1852] HL Cas 759; *The Queen v Rand and Others* [1866] LR 1 QB 230; *Regina v Camborne Justices and Another ex parte Pearce* [1955] 1 QB 41). (Emphasis added.)

[117] Accordingly, when seized with a recusal application, the court must first ascertain whether the presiding judge has any pecuniary or direct interest in the matter. In the absence of such an interest, the court shall then apply the established judicial tests developed through precedent to determine whether recusal is warranted.

[118] In Malaysia, it is trite that the applicable test is *'the real danger of bias'* test (see the decision of Edgar Joseph Jr FCJ (as His Lordship then was) at paras 69E to 70B in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1) (*Majlis*

Perbandaran Pulau Pinang). In this regard, Lord Goff at para 670F in *Regina v Gough* [1993] AC 646; [1993] 2 WLR 883 explained:

> Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, *there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him* ... (Emphasis added.)

[119] In adopting the 'real danger of bias' test, the Federal Court had highlighted that the issue of bias has to be answered by looking at all the relevant facts and not only by taking the lens of a hypothetical reasonable man. Application of the test in Malaysia was confirmed by the case of *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293 as when the Court of Appeal formulated a new test to be applied in determining perceived or apparent bias which did not accord with the applicable test adopted by the Federal Court in *Majlis Perbandaran Pulau Pinang*. It was held that the Court of Appeal was bound by the doctrine of stare decisis and regardless if in England, that the test in *Regina v Gough* [1993] AC 646; [1993] 2 WLR 883 had been modified, it was not relevant in Malaysia because the old test would not lead to any injustice, nor would the new test lead to more justice.

[120] Our view is that the learned HCJ ought to have relied on the case of *Dato' Tan Heng Chew*, where in the Federal Court, Abdul Hamid Mohamad FCJ stated:

> objectively viewed, is there a real danger of bias on the part of the learned judge if she were to continue to try the suit? While she feels she may not be, my answer is in the affirmative. In this situation, if I were to err, I would prefer to err on the side of recusal ...

[121] This test was further affirmed in the Federal Court cases of *Public Prosecutor v Tengku Adnan bin Tengku Mansor* [2020] 5 MLJ 220 and *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 2)* [2022] 5 MLJ 135 ('Tengku Adnan'). In the case of *Tengku Adnan*, the appellant filed an appeal against the Court of Appeal's decision in reversing the High Court's decision that had dismissed the recusal application. The decision of the Court of Appeal was later set aside by the Federal Court in the present appeal on the grounds that there was no 'real danger of bias' of a trial judge continuing to hear a joint trial after one of the accused persons had pleaded guilty as it is an established judicial practice and settled law.

[122] At this point, it is pertinent to emphasise that circumstances amounting to perceived or apparent bias are so varied that great reliance must be placed on the judgment of the judge. At the end of the day, the decision whether to recuse

from the case will depend fundamentally on the particular facts and circumstances of each case and the court should be vigilant not to allow parties to do judge-shopping by recusal of judges *Locabail (UK) Ltd v Bayfield Properties Ltd and another; Locabail (UK) Ltd and another v Waldorf Investment Corp and others; Timmins v Gormley; Williams v HM Inspector of Taxes and others; R v Bristol Betting and Gaming Licensing Committee, ex parte O'Callaghan* [2000] 1 All ER 65; *Dato' Tan Heng Chew*.

[123] Subsequently, at para 480B, in the *Locabail case,* the English Court of Appeal, held that '[i] It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias ...', the English Court of Appeal did list out certain situations where '... a *real danger of bias might arise ...',* as follows (see paras 480D to 480F, the *Locabail* case):

> 1. ... there were personal friendship or animosity between the judge and any member of the public involved in the case ...;
>
> 2. ... if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case ...;
>
> 3. ... if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion ...;
>
> 4. *... if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective mind ...*;
>
> and
>
> 5. *... if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him ...* (Emphasis added.)

[124] Applying the circumstances above to the present case before the court today, it can be said that the peculiar circumstances would be that the learned HCJ in the proceedings before him had expressed views, particularly in the course of the hearing of the continued trial, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective mind. In assessing this circumstance, the legal status and appealability of the impugned judgment must be set aside. Instead, the focus should be on the very fact that the impugned judgment was authored, notwithstanding the reasoning provided in para 3 of the said impugned judgment.

[125] The justification for the learned HCJ's recusal arises from the extrajudicial nature of the impugned judgment, which ought not to have been

written, particularly as it pertained to the appellant, who, at the material time, was legal counsel for the former defendants — a position that carries the responsibility of being an officer of the court.

[126] Moreover, the impugned judgment cannot be said to have been written with objectivity, rationality, or temperance in language. The expressions used therein were neither mandated by law nor aligned with the established norms of judicial propriety. It is a fundamental principle that judicial pronouncements must be articulated in a temperate and measured manner, devoid of satire, exaggeration, or undignified language. Paragraphs 72–77 of the appellant's composite written submission are referred to on this point.

[127] In light of the facts and circumstances of this case, it is evident that there exists a real danger of bias on the part of the learned HCJ in presiding over the intervention application and expunction application of the impugned judgment. The dismissal of the recusal application further substantiates this concern, warranting appellate intervention by this court.

CONCLUSION AND DECISION

[128] For the above reasons, this court therefore allowed the appellant's both Appeals 154 and 155 and allowed the appellant's intervention application, expunction application and recusal application with no order as to costs. The High Court order dated 30 December 2022 is hereby set aside. We also ordered that the impugned judgment be expunged in its entirety.

Appeals allowed unanimously; High Court's decision set aside; appellant's applications allowed and impugned judgment ordered to be expunged in its entirety.

Reported by Ashok Kumar